

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JEFF SCHMIDT,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:03-cv-1691
)	Judge Ricardo M. Urbina
)	
AMERICAN INSTITUTE OF PHYSICS,)	
)	
Defendant.)	

**PLAINTIFF JEFF SCHMIDT’S MEMORANDUM IN OPPOSITION
TO DEFENDANT’S MOTION TO TRANSFER VENUE
TO THE DISTRICT OF MARYLAND**

I, plaintiff *pro se* Jeff Schmidt, respectfully submit this memorandum in opposition to Defendant’s motion to transfer venue from the District of Columbia to the Southern Division of the District of Maryland.

PRELIMINARY STATEMENT

To decide Defendant’s motion, the Court need only consider whether a person who was employed in the District of Columbia, resides in the District of Columbia, and was fired while working in the District of Columbia at his employer’s behest can seek redress in a District of Columbia federal court. Defendant does not—and cannot—allege that venue is inappropriate or improper in the District of Columbia. Defendant does not even allege that litigating this case in the District of Columbia would be inconvenient, unjust, or unfair. Instead, Defendant simply wishes to transfer the case a few miles away from this Court to a court in suburban Maryland that is not significantly closer to its corporate offices and witnesses. Defendant’s apparent desire for a different court or jury pool provides no basis for disturbing the strong presumption favoring the

plaintiff's choice of forum. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981); Prof'l Managers' Ass'n v. United States, 761 F.2d 740, 744 (D.C. Cir. 1985)(noting Congressional disdain for forum shopping).

The Court should also consider the substantial economic and power disparity between the parties to this case. As a 57-year-old unemployed man with limited funds and no access to a car, I would be unduly inconvenienced if forced to litigate in Maryland. See Int'l Bhd. of Painters & Allied Trade Union v. Rose Bros. Home Decorating Ctr., 1992 WL 24036, at *2 (D.D.C. 1992)(holding that court may not transfer venue if transfer would shift inconvenience from defendant to plaintiff). Accordingly, the Court's "individualized, case-by-case consideration of convenience and fairness" should be resolved in my favor. See Kafack v. Primerica Life Insurance Co., 934 F. Supp. 3, 5 (D.D.C. 1996). I respectfully ask the Court to deny Defendant's motion and allow me to pursue my case in the District of Columbia.

SUMMARY OF CLAIMS

After nineteen years of working as a feature-article editor at *Physics Today* magazine, which Defendant publishes, I was summarily fired on May 31, 2000. The pretext for my firing was Defendant's dissatisfaction with ideas presented in a book I had recently written, *Disciplined Minds: A Critical Look at Salaried Professionals and the Soul-Battering System that Shapes their Lives* (Rowman & Littlefield). The National Labor Relations Board's Office of Appeals subsequently found on June 29, 2001, that I had established a prima facie case that I was discharged instead for engaging in protected concerted activities, including advocating for more diversity and more humane treatment in Defendant's workplace, and that Defendant bore "animus" toward me for engaging in those activities. The Office of Appeals further found that Defendant had created a repressive working environment by making "threats of discipline and other retaliatory conduct in order to discourage employees from discussing working conditions with each other and informing

[Defendant] of their collective concerns,” conduct considered “violative of the National Labor Relations Act.”

I contend that the firing was also a breach of contract, the cause of action underlying this suit. On several occasions, in response to my threat to leave Defendant’s place of employment if I were not free to express my views, Defendant agreed to judge me on my work performance alone, which induced me to remain in Defendant’s employ. Defendant retorts that I was bound by Defendant’s employee handbook, which Defendant argues does not expressly guarantee free expression and enjoins Defendant from entering into any agreements with me.

Defendant’s decision to fire me for workplace activism and for expressing my views has generated widespread national and international outrage. More than 800 scientists and other scholars, including physicists from 34 countries and two Nobel Laureates, have condemned my firing. See the Web site at <http://disciplinedminds.com> for a sampling of opinion. In at least one regard, then, the case “has some national significance and [therefore] has a nexus to the District of Columbia,” Greater Yellowstone Coalition v. Bosworth, 180 F.Supp.2d 124, 129 (D.D.C. 2001), though the case remains at its heart a breach-of-contract action for which venue is appropriate in the District of Columbia.

ARGUMENT

The Court Should Dismiss Defendant’s Motion Because Venue is Appropriate in the District of Columbia and Defendant has Failed to Show That Litigating the Case in this Court Would Inconvenience Defendant Any More than Litigating the Case in Maryland Would Inconvenience Me

Defendant’s argument that the claim “could have been brought in Maryland” is moot. The test is whether the claim could have been brought in the jurisdiction in which I brought it—the District of Columbia—and, if so, whether overriding considerations mandate transferring the case somewhere else. Defendant does not even come close to meeting its “heavy burden” in

asking this Court to transfer venue to a neighboring jurisdiction. Shapiro, Lifchitz, Schram, P.C. v. R.E. Hazard, Jr., 24 F. Supp. 2d 66, 70 (D.D.C. 1998).

A. A Substantial Part of the Events Giving Rise to this Action Occurred in the District of Columbia

Although Defendant does not appear to contend that venue is inappropriate or improper in the District of Columbia but simply would prefer to litigate in Maryland, Defendant grossly misrepresents where the operative events occurred in this matter. The signatory of the Affidavit on which Defendant relies, Theresa Braun, is an upper-echelon official who is apparently unfamiliar with my work history at Defendant. I believe the following facts, attested to under oath in my Affidavit, will be more useful to the Court than a point-by-point rebuttal of the many factual errors in Defendant's Motion:

- I have resided in the District of Columbia for the past 10 years. Schmidt Affidavit at 4.
- I worked for AIP in the District of Columbia from July 25, 1997, until AIP fired me on May 31, 2000. Schmidt Affidavit at 8.
- At the time Defendant fired me, on May 31, 2000, I worked for Defendant in the District of Columbia and therefore no longer had my own office at *Physics Today's* main office, in Maryland. Instead, I was assigned a shared space at *Physics Today's* main office to use when I visited there. Management told me that I didn't need my own office in Maryland, because I worked in the District of Columbia and the company wanted to reduce overhead costs. Schmidt Affidavit at 12.
- In 1993, Defendant hired a real estate agent to help me find somewhere to live in the District of Columbia. Schmidt Affidavit at 13.
- Also in 1993, Defendant hired a moving company to pack all of my personal belongings and home furniture and move them from New York to the District of Columbia. Schmidt Affidavit at 14.
- From July 25, 1997, until Defendant fired me on May 31, 2000, I worked for Defendant at my home office in the District of Columbia four days a week, and at *Physics Today's* main office in Maryland only one day a week. Schmidt Affidavit at 17.
- Defendant paid more than half the cost of the computer that I used to do my work in my District of Columbia home office. Schmidt Affidavit at 18.

- Defendant gave me computer software that enabled me to access, from my District of Columbia office, e-mail sent to my American Institute of Physics e-mail address. Schmidt Affidavit at 19.
- I participated in *Physics Today* staff meetings by speakerphone from the District of Columbia. Schmidt Affidavit at 20.
- My workplace activism, which led in part to my dismissal, involved meeting with coworkers. Many of those meetings took place in the District of Columbia, near my home office. Schmidt Affidavit at 24.
- I filed my National Labor Relations Board charge against Defendant at the NLRB's District of Columbia office. Defendant's argument that Jeff Schmidt "never has filed a charge or complaint against Defendant with any administrative agency located in the District of Columbia" is therefore incorrect. Schmidt Affidavit at 26.
- The event that prompted the American Institute of Physics to place a gag order on me and to take other repressive measures that led to my dismissal occurred in the District of Columbia. Schmidt Affidavit at 28.
- Defendant CEO and Executive Director Marc H. Brodsky delivered to me his harshest criticism of me during a telephone conversation that took place while I was at work in my District of Columbia office. He accused me of making "a very, very serious charge" about *Physics Today*'s hiring practices when I told the *Physics Today* advisory committee that because the magazine had hired and trained only white people as editors for many years, the magazine was left with a virtually all-white professional staff. Schmidt Affidavit at 29.

In summary, many or most of the events "giving rise to this litigation [...] occurred in the District of Columbia." Cf. Defendant's Motion at 7. On that basis, Defendant's presumptions about choice-of-law matters in this case are conclusory, self-serving, and premature. See Defendant's Motion at 8 (declaring that Maryland law governs the claims at issue and then asserting the tautology that a Maryland-based court must hear the case).

Also premature are Defendant's pronouncements about which documents and witnesses will figure in this case, particularly since no discovery requests have been served. Although Defendant has presumed, for example, that my witnesses are in Maryland (See Defendant's Motion at 7), I plan to call witnesses in New York and Virginia. These witnesses would be more likely to testify if the trial were held at the courthouse in the District of Columbia than if it were held in the District of Maryland. Schmidt Affidavit at 25.

B. Litigating in the District of Columbia Will Not Inconvenience Defendant

The purpose of the venue provisions is not to allow defendants to seek an alternative forum that offers them some perceived advantage, but to “afford defendants protection where [...] plaintiff’s choice of forum will make litigation **oppressively** expensive, inconvenient, difficult or harassing to defend.” Starnes v. McGuire, 512 F.2d 918, 927 (D.C. Cir 1974)(emphasis added). Defendant does not even come close to making that requisite showing.

Defendant is a well-funded entity that has chosen to retain, for this case alone, expensive and highly-trained counsel not near its Maryland offices, but in the Vienna, Virginia and Long Island, New York offices of a major national law firm. To the extent documents are produced in discovery, those documents will remain off-site in the custody of those attorneys. Cf. Defendant’s Motion at 7; see also DiMark Mktg, Inc. v. Louisiana Health Serv. & Indem. Co., 913 F. Supp 402, 409 (E.D. Pa. 1996) (“As is the case with witnesses, general allegations that transfer is needed because of books and records are not enough.”). In that context, it almost defies belief that Defendant suggests that litigating a case in the District of Columbia, when it keeps an office in nearby College Park, Maryland, would cause it any burden at all, let alone an “oppressively expensive” or “harassing” one. McGuire, 512 F.2d at 927. In any event, as attested to in my affidavit, Defendant does business in the District of Columbia. Its *Physics Today* division has an office there. It sells its products to hundreds of customers there. It pays the salary of a congressional staff member there. Schmidt Affidavit at 21.

Put another way, “the convenience of the parties and the witnesses” cannot be said to “support a transfer of venue” in any respect. Cf. Defendant’s Motion at 8. Indeed, Defendant proves too much with its condescending statement that “Plaintiff will not be unduly inconvenienced

by having the instant action heard in Maryland. The District Court of Maryland, Southern Division is less than a one hour drive from this District of Columbia Court.” Defendant’s Motion at 8.

Besides the fact that I do not even own a car, the District of Columbia Court is also “less than a one hour drive” from College Park, where Defendant claims its witnesses may be found. See also, e.g., Trout Unlimited v U.S. Dep’t of Agriculture, 944 F. Supp. 13, 16 (D.D.C. 1996)(convenience of witnesses only matters “to the extent that witnesses may actually be unavailable for trial”).

C. Litigating in Maryland Would Unduly Inconvenience Me

It is axiomatic that in considering whether a forum is inconvenient for parties and witnesses, the court must not transfer venue if the transfer would simply shift inconvenience from the defendant to the plaintiff. Int’l Bhd. of Painters & Allied Trade Union, 1992 WL 24036, at *2. Even if Defendant had alleged and proved any inconvenience, which it has not, transferring this case to Maryland would cause me great hardship.

First, as mentioned above, for the past 22 years I have not owned an automobile. I travel exclusively by public transportation, which can be extremely inconvenient if not carefully arranged. To persuade me to move from New York to the Washington, D.C., area in 1993, Defendant promised me that its office in the Washington metropolitan area would be easily accessible by the Metrorail train. Indeed, Defendant’s Maryland office is a short walk from a Metro station. The most practical way for me to reside near a Metro station was to reside in the District of Columbia, which I did. Schmidt Affidavit at 23. For these reasons, I ask the Court not to assume that I can simply get in my car and travel to Maryland to litigate this case.

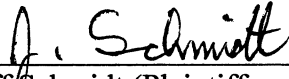
Also as mentioned above, some of the key witnesses I intend to call reside in New York and Virginia and would be more likely to testify if the trial were held at the courthouse in the District of Columbia than if it were held in the Southern Division of the District of Maryland. Schmidt Affidavit at 25.

Finally, I have contacted an attorney interested in my case but who has not yet been admitted to practice in this Court. He is a member of the District of Columbia and Virginia bars but is not a member of the Maryland bar. Transferring venue would therefore deprive me of representation in the face of an onslaught of aggressive litigation tactics, including asking me to consent to a transfer of venue when it was clearly not in my interest to do so. Schmidt Affidavit at 3 and 27; see also Defendant's Motion at 1.

CONCLUSION

Based on my 19 years of experience at the American Institute of Physics, I believe that if the demographics of the District of Columbia and the Southern Division of the District of Maryland were reversed, Defendant would not be seeking this transfer. I respectfully ask the Court to deny Defendant's motion for that reason and for the reasons stated above.

Respectfully submitted,



Jeff Schmidt (Plaintiff *pro se*)
3003 Van Ness Street NW #W406
Washington, DC 20008

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JEFF SCHMIDT,)	
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Plaintiff,)	
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v.)	Civil Action No. 1:03-cv-1691
)	Judge Ricardo M. Urbina
)	
AMERICAN INSTITUTE OF PHYSICS,)	
)	
Defendant.)	

AFFIDAVIT OF JEFF SCHMIDT

DISTRICT OF COLUMBIA)	
)ss.:	
)	

Jeff Schmidt, being duly sworn, deposes and says:

1. I make the statements herein based upon my own personal knowledge, except such matters as are alleged on information and belief, and as to those matters, I believe them to be true.

2. I submit this Affidavit in support of Plaintiff's Opposition to Defendant's Motion to Transfer Venue from the United States District Court, District of Columbia, to the United States District Court for the District of Maryland, Southern Division.

3. I recall receiving one electronic mail message, not two, from Defendant asking if I would consent to a transfer of venue. I responded by suggesting that we discuss the issue at the "Duty to Confer" meeting. Defendant responded, in turn, by asking the Court to transfer venue. Thus Defendant's effort to resolve the dispute was only *pro forma*. All of our communication on this matter was by electronic mail, which I have saved.

4. I have resided in the District of Columbia for the past 10 years.

5. I was employed by the American Institute of Physics (AIP) for 19 years, from March 17, 1981, until AIP fired me on May 31, 2000.

6. I worked for AIP in New York from 1981 to 1993.

7. I worked for AIP in Maryland from 1993 to 1997. Defendant's statement that "Plaintiff commenced employment with AIP at its College Park, Maryland location in or about March 1981" is therefore untrue. See Defendant's Motion at 3.

8. I worked for AIP in the District of Columbia from July 25, 1997, until AIP fired me on May 31, 2000.

9. Nearly all the operative events in this action occurred while I worked for AIP in the District of Columbia, between July 25, 1997, and May 31, 2000.

10. From 1981 to 1997, when I worked for AIP in New York and Maryland, AIP provided me with my own private office located at *Physics Today* magazine's main office, first in New York and then in Maryland.

11. All *Physics Today* employees of my rank who were employed in Maryland had their own private offices at *Physics Today*'s main office, in Maryland.

12. At the time AIP fired me, on May 31, 2000, I worked for AIP in the District of Columbia and therefore no longer had my own office at *Physics Today*'s main office, in Maryland. Instead, I was assigned a shared space at *Physics Today*'s main office to use when I visited there. Management told me that I didn't need my own office (in Maryland), because I worked in Washington, D.C., and that the purpose of sharing space was to reduce overhead costs.

13. In 1993, AIP hired a real estate agent to help me find somewhere to live in the District of Columbia.

14. Also in 1993, AIP hired a moving company to pack all of my personal belongings and home furniture and move them from New York to the District of Columbia.

15. From 1993 to 1997, when I worked for AIP in Maryland, I worked a few days per month in the District of Columbia.

16. From 1997 to 2000, when I worked for AIP in the District of Columbia, I worked a few days per month in Maryland.

17. From July 25, 1997, until AIP fired me on May 31, 2000, I worked for AIP at my home office in the District of Columbia four days a week, and at *Physics Today*'s main office only one day a week.

18. AIP paid more than half the cost of the computer that I used to do my work in my District of Columbia home office.

19. AIP gave me computer software that enabled me to access, from my District of Columbia office, e-mail sent to my American Institute of Physics e-mail address.

20. I participated in *Physics Today* staff meetings by telephone (speakerphone) from the District of Columbia.

21. AIP does business in the District of Columbia. Its *Physics Today* division has an office there. It sells its products to hundreds of customers there. It pays the salary of a congressional staff member there.

22. AIP was incorporated in New York in 1931. Although AIP opened offices in Maryland in 1993, the majority of its employees and production remained in New York. AIP CEO and Executive Director Marc H. Brodsky keeps an office in New York and an office in Maryland. AIP Vice President, Human Resources, Theresa C. Braun keeps an office in New York and an office in Maryland. AIP has personnel offices in New York and in Maryland.

23. For the past 22 years, I have not owned an automobile. I travel exclusively by public transportation, which can be extremely inconvenient if not carefully arranged. To persuade me to move from New York to the Washington, D.C., area in 1993, AIP promised me that its office in the Washington metropolitan area would be easily accessible by the Metrorail train. Indeed, AIP's Maryland office is a short walk from a Metro station. The most practical way for me to reside near a Metro station was to reside in the District of Columbia, which I did.

AIP argues that, "Plaintiff will not be unduly inconvenienced by having the instant action heard in Maryland. The District Court of Maryland, Southern Division is less than a one hour drive from this District of Columbia Court." See Defendant's Motion at 8. However, starting from the place where I worked, the federal courthouse in the District of Columbia is much more convenient for me to access by public transportation (one train) than is the federal courthouse in Greenbelt, Maryland (two trains and a bus).

24. My workplace activism, which led in part to my dismissal, involved meeting with coworkers. Many of those meetings took place in the District of Columbia, near my home office.

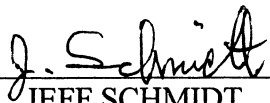
25. Although AIP has presumed that all my witnesses are in Maryland (See Defendant's Motion at 7), I plan to call witnesses in New York and Virginia. These witnesses would be more likely to testify if the trial were held at the courthouse in the District of Columbia than if it were held in the Southern District of Maryland.

26. I filed my National Labor Relations Board charge against AIP at the NLRB's District of Columbia office. AIP's argument that Jeff Schmidt "never has filed a charge or complaint against AIP with any administrative agency located in the District of Columbia" is invalid.

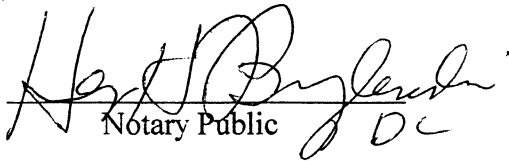
27. I have contacted an attorney interested in my case but who has not yet been admitted to practice in this Court. He is a member of the District of Columbia and Virginia bars but is not a member of the Maryland bar. Transferring venue would therefore deprive me of representation.

28. The event that prompted the American Institute of Physics to put a gag order on me and to take other repressive measures that led to my dismissal occurred in the District of Columbia.

29. AIP CEO and Executive Director Marc H. Brodsky delivered to me his harshest criticism of me during a telephone conversation that took place while I was at work in my District of Columbia office. He accused me of making "a very, very serious charge" about *Physics Today's* hiring practices when I told the *Physics Today* advisory committee that because the magazine had hired and trained only white people as editors for many years, the magazine was left with a virtually all-white professional staff.


JEFF SCHMIDT

Sworn to before me this
4th day of November, 2003.


Notary Public DC

my commission expires 8/31/05

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JEFF SCHMIDT,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:03-cv-1691
)	Judge Ricardo M. Urbina
)	
AMERICAN INSTITUTE OF PHYSICS,)	
)	
Defendant.)	

ORDER DENYING DEFENDANT’S MOTION TO TRANSFER VENUE

Having considered Defendant’s motion to transfer venue to the District of Maryland, Southern Division, the Court hereby orders that the motion is denied.

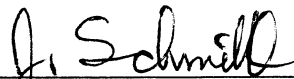
Dated: November ____, 2003

The Honorable Ricardo M. Urbina
United States District Court
for the District of Columbia

CERTIFICATE OF SERVICE

On this 5th day of November, 2003, I sent the following party via first-class mail a copy of the foregoing Plaintiff's Opposition to Defendant's Motion to Transfer Venue, proposed Order Denying Defendant's Motion to Transfer Venue, and Affidavit in support of Plaintiff's Opposition to Defendant's Motion to Transfer Venue:

Teresa Burke Wright, Esq.
Jackson Lewis LLP
8614 Westwood Center Drive, Suite 950
Vienna, VA 22182



Jeff Schmidt (Plaintiff *pro se*)
3003 Van Ness Street NW #W406
Washington, DC 20008